IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 18TH DECEMBER 2006 / 27TH AGRAHAYANA 1928

WP(C).No. 31651 of 2006(R)

OS.25/2003 of III ADDL.SUB COURT, KOZHIKODE

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PETITIONER:

K.MUSTHAFA, AGED 49, S/O.KUNHAKI,
RESIDING AT MARIYAS, CHEVAYOOR AMSOM AND DESOM,
KOZHIKODE TALUK.

BY ADV. SRI.C.P.MOHAMMED NIAS

RESPONDENTS:

J.DAVID RAVI, AGED 42,
S/O.JOSEPH, RESIDING AT REVATHY,
VENGERI AMSOM AND DESOM, KOZHIKODE TALUK.

BY ADV. SRI.V.V.SURENDRAN
SRI.P.A.HARISH

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 18/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

W.P.(C) NO.31651/2006

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1:- COPY OF THE PETITION AND THE AFFIDAVIT DT.20.10.03 IN IA. NO.4434/03 3RD ADDL. SUB COURT, KOZHIKODE.

EXT.P2:- COPY OF THE LIST SUBMITTED ON 4.7.06 SUBMITTED BEFORE THE 3RD ADDL.SUB COURT, KOZHIKODE.

EXT.P3:- COPY OF THE ORDER DT.30.8.06 IN IA. 4434/03 OF THE 3RD ADDL.SUB COURT, KOZHIKODE.

EXT.P4:- COPY OF THE REVIEW APPLICATION, IA.4336/06 DT.22.9.06 FILED IN OS.25/03 ON THE FILE OF THE 3RD ADDITIONAL SUBORDINATE JUDGE'S COURT, KOZHIKODE.

EXT.P5:- COPY OF THE COUNTER FILE BY THE RESPONDENTS IN IA.4336/06 IN OS.25/03 ON THE FILE OF THE 3RD ADDITIONAL SUBORDINATE JUDGE COURT, KOZHIKODE.

EXT.P6:- COPY OF THE ORDER DT.2510-2006 OF THE 3RD ADDITIONAL SUBORDINATE JUDGE, KOZHIKODE IN IA. 4336/06 IN OS. 25/03.

/TRUE COPY/

M.SASIDHARAN NAMBIAR, J.

W.P.C.NO.31651 OF 2006 (R)

Dated this the 18 th day of December, 2006.

JUDGMENT

Petitioner is defendant and respondent plaintiff in O.S.25/03 on the file of Sub Court, Kozhikkod. An agreement was entered into by plaintiff and defendant whereunder defendant has to construct the residential building in the property of plaintiff. The contract fell through before completing the construction. Suits were instituted by both sides and they are pending before Sub court, Kozhikkod. O.S.25/03 was filed by plaintiff. In that suit, a commissioner was appointed to value the cost of construction made by the defendant. The commissioner sought assistance of an expert. An expert engineer was appointed to assist the commissioner. Defendant filed I.A.4434/03, an application under Rule 10 of Order XXVI of Code of Civil Procedure, to set aside the report submitted by the commissioner. Respondent opposed the application. After hearing both the parties, Ext.P3 order was passed dismissing that application. Ext.P3 order reveals that " when the petiti0on was heard, a consensus emerged between the parties that the commission report and statement of valuation may be returned to the Advocate Commissioner directing the same to be resubmitted with a report by another expert, who may

have more expertise in the matter so that he may be capable of making an independent or case-related assessment of the construction work done". Ext.P3 order also shows that both parties were directed to furnish list of experts. The defendant submitted a panel consisting of three names. When the matter was heard after the submission of the panel, learned sub Judge held that "respondent(plaintiff) did not have any objection to the court accepting the contract rates cited in the report of the expert appended to the commission report filed by M/s. Asha Bhaskar, the Advocate Commissioner. Upon such submission being made from the side of the respondent(plaintiff), the counsel representing the petitioner (defendants) did not appear to be averse to the court closing the petition on hand". On that basis, the petition was closed. Defendant there after filed I.A.4336/06, an application under Order XLVII Rule 1 of the Code, to review that order contending that there was no such consensus to close the petition. He had also furnished other grounds to review the order. Under ext.P6 order, that petition was dismissed. It is challenged in this petition filed under Article 227 of Constitution of India.

2. Learned counsel appearing for petitioner and respondent were heard.

3. As is clear from Ext.P3 order, when the application to set aside, the commission report was heard, a consensus was emerged before the court for remitting the report back to the commissioner to file a report with the assistance of another expert. Parties were directed to give the names of the expert. It is thereafter the petition was closed, observing that plaintiff suggested a course which was agreed to by the defendant. Defendant took objection to the order contending that there was no such agreement on his part. I.A.4336/06, an application for review was filed on that ground. It was dismissed under Ext.P6. But learned Sub Judge did not consider the grounds stated by the defendants for reviewing Ext.P3 order. Instead Ext.P6 order was passed considering other aspects. It was not dismissed on the ground that there was in fact an agreement and the case of petitioner was not correct. The order does not show that learned Sub Judge was not satisfied that there are sufficient grounds to review Ext.P3 order. Unless Ext.P3 order was reviewed, the I.A.4434/03 cannot be reheard. I.A.4336/06 was dismissed without

considering the ground stated on the application. Under Ext.P3 order, learned Sub Judge originally found that report is to be remitted to file a report with the assistance of an expert. But that was not done only for the reason that there was another agreement. If there was no agreement, I.A.4434/03 has to be disposed on merits. As I.A.4336/06 was not disposed after considering the merits. Ext.P5 order is quashed. Learned Sub Judge is directed to pass appropriate order in I.a.4336/06. Learned Sub Judge shall hear the parties and decide whether there was sufficient ground to review Ext.P3 order. If learned Sub Judge finds that there are grounds to review the order, then I.A.4434/03 shall be reheard and pass appropriate order in accordance with law.

Petition disposed accordingly.

M.SASIDHARAN NAMBIAR,
JUDGE.

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